

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)	
)	No. 13-CR-10200-GAO
v.)	
)	
)	
DZHOKHAR TSARNAEV)	

**DEFENDANT’S THIRD MOTION FOR HEARING
TO ADDRESS LEAKS BY LAW ENFORCEMENT**

Defendant, Dzhokhar Tsarnaev, by and through counsel, hereby files a Third Motion for a Hearing to Address Leaks by Law Enforcement. This motion is precipitated by a recent article in *Newsweek* by a Boston-based television journalist containing assertions attributed to multiple sources in law enforcement who, apparently, continue to leak highly prejudicial non-public information (at least some of which is erroneous) that imperils Mr. Tsarnaev’s right to a fair trial.

Background

The defendant has filed two previous motions to address a pattern of leaks of information by law enforcement. [DE 280, 336, 438]. Each time, the government objected to a hearing. The government has denied that it had the authority to control statements by recently-retired law enforcement officials, minimized the impact of leaks, and advised the court of efforts to stop law enforcement disclosure of investigative materials and statements to the news media. [DE 312, 463].

Addressing the defendant's First Motion at the June 18, 2014 status conference, the Court expressed displeasure with the leaks and public comments by law enforcement, and singled out the participation of recently-retired law enforcement officials on the 60 Minutes and National Geographic broadcasts:

Let me just say I saw both interviews in real time when they occurred and I was not very happy about it. I thought they were completely unnecessary opportunities for the communication of information which would be inappropriate from active members of the prosecution team I do think that the prosecution has practical, if not legal control over them. And I expect the government will remind people involved in the case, even formerly, of their responsibility to the integrity of the trial

Status Conference Transcript, DE 425, at 7. The Court directed government counsel to "communicate to [law enforcement] that it is unwise for them to – and for anybody else in their position to engage in similar interviews." *Id.* When defense counsel pressed for an order that would subject individuals to sanctions for leaking information about the case, the Court responded, "I don't think a formal order would add that much. If something happens that it's similar, with or without a formal order I can take appropriate action." *Id.* at 8-9.

Five weeks later, on July 22, 2014, the U.S. Attorney sent a letter to all law enforcement agencies involved in the case advising of the Court's concerns about comments regarding the investigation or the defendant by current or former law enforcement agents, and noting that such disclosures may result in sanctions against the government and jeopardize the prosecution. [DE 463-1].

In addressing the defendant's Second Motion, the Court found the timing of the government's July 22 letter may have been "coincidental with events in the Silva case

which led to the comments [by law enforcement]” and, as a result, the letter was not effective to ward off those comments. However, the Court continued to “underscore [its] concern that [the admonition letter] be taken to heart by all the ranks” and asked:

[i]f the government has not done so, whether it might, and should, get an affirmative response from the people to whom the letter was sent that they have, in fact, communicated it to their staffs, again, to underscore my concern.

Having made that request, the Court determined that “no further inquiries are necessary at this time.” Status Conference Transcript, DE 425, at 4.

The government’s actions and the Court’s admonitions apparently have not stopped the flow of information from “multiple law enforcement sources” or “a high ranking law enforcement source involved in the investigation” to at least one local Boston journalist, Michele McPhee. Indeed, anonymous law enforcement sources apparently contributed substantially to Ms. McPhee’s recent piece in *Newsweek Magazine* that casts the entire Tsarnaev family in an extremely negative light, and suggests that others were somehow involved. *See Michele McPhee, Family Matters: Dzhokhar Tsarnaev and the Women in His Life, Newsweek*, Oct. 16, 2014, available at <http://www.newsweek.com/2014/10/24/women-behind-boston-marathon-bombing-suspects-277760.html>. For example, Ms. McPhee wrote: “Multiple law enforcement sources tell *Newsweek* that [Katherine] Russell [widow of Tamerlan Tsarnaev] is part of an ongoing Boston Marathon investigation. ‘She remains in the web of suspicion’ says one high ranking government official, and has been under surveillance since the blasts.” *Id.* The *Newsweek* piece relies on another “high-ranking law enforcement source

involved in the investigation” to suggest that a “best friend” of Dzhokhar allegedly “exchanged questionable, public messages that could be interpreted as referring to the Boston Marathon bombing.” *Id.*

Notably, prior articles by Ms. McPhee also contain numerous leaks of information by law enforcement, much of it demonstrably inaccurate:

- “...a high ranking law enforcement official said that while Tamerlan may have used the Ruger last, it was Dzhokhar who was friends with Silva and in the end ‘it was Dzhokhar’s gun.’ The defense is trying to paint Tamerlan as the mastermind [of the Boston attacks], but they were working in concert and we have evidence that Dzhokhar secured the weapon’, the official said.” *See* <<http://abcnews.go.com/Blotter/official-gun-shows-dzhokhar-tsarnaev-played-greater-role/story?id=24671232>> [ABC News, June 22, 2014, Michele McPhee.]
- “Massachusetts investigators have developed what they call ‘mounting evidence,’ bolstered by ‘forensic hits’ that points to the possible involvement of both Tamerlan Tsarnaev and his younger brother Dzhokhar in a gruesome, unsolved triple homicide in 2011, law enforcement officials told ABC News.” *See* <<http://abcnews.go.com/Blotter/mounting-evidence-boston-bombers-involved-2011-triple-murder/story?id=19151271>> [ABC News, May 10, 2013, Michele McPhee.]
- Ms. McPhee published non-public photographs of the writings allegedly made by Mr. Tsarnaev in the boat where he was discovered on April 19, 2013. *See* <<http://abcnews.go.com/Blotter/image-shows-dzhokhar-tsarnaevs-message-arrest/story?id=23335984>> [April 17, 2014, Michele McPhee.]
- “*Feds Searching For Friend of Boston Marathon Suspect, 'Concern' Over Chechnya Trip*” *See* <<http://abcnews.go.com/Blotter/feds-searching-friend-boston-marathon-suspect-concern-chechnya/story?id=22708871>> [ABC News, March 4, 2014, Michele McPhee.] (“‘No one is calling Heda a terrorist but her travel has certainly garnered some attention. People are concerned that a 23-year-old is in Chechnya, a country that she fled from...and now she is deciding to stay on her own,’ a ranking law enforcement source involved in the Boston Marathon investigation told ABC News. The source said that her decision to stay in Chechnya also raised eyebrows because, at least until she is married, she didn't seem to have any “obvious means” of support.”)

- “As police searched for him, and as he lay bleeding in his boat hideout, Boston Marathon bombing suspect Dzhokhar Tsarnaev wrote ‘F*** America’ on the side panel of the boat, police in Massachusetts told ABC News.’ See <http://abcnews.go.com/Blotter/america-boston-marathon-bomb-suspect-wrote-boat-officials/story?id=19193153> [ABC News, May 16, 2013, Michele McPhee.]

Whoever Ms. McPhee’s anonymous sources may be, the most recent Newsweek article indicates that their willingness to disclose prejudicial and inaccurate information continues unabated, and that neither the government’s nor the Court’s admonitions have sufficed to deter them.

Conclusion

The Court has twice asked the government to address the issue of unauthorized public comments by members of law enforcement, and the government has advised it has done so. However, the public comments, or leaks, have not stopped. The prejudicial impact of the continuing leaks will only increase as trial approaches. Therefore, the defense again requests that the Court hold a hearing, and direct government counsel to produce the supervising law enforcement officers with access to information about this case – including both federal and state supervising agents or officers – to testify about their instructions and efforts to investigate and stop unauthorized communications with news media.

Respectfully submitted,
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By his attorneys

/s/ Judy Clarke

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Certificate of Service

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/s/ Judy Clarke